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VIETNAM CHAPTER

By Truong Nhat Quang
Diep Hoai Nam
Le Cong Dinh

The Asian financial crisis in 1997 caused a number of projects in Vietnam (particularly foreign investment projects) to fail, triggering many restructurings, buyouts and acquisitions. Some foreign investors sought to buy out the interests of their local partners in joint ventures – the Procter & Gamble restructuring in 1998 was a precedent that encouraged this tendency. Several others that made multiple investments in Vietnam took steps to merge their various foreign invested enterprises (FIEs) to reduce costs. The restructuring of commercial banks and state-owned enterprises (SOEs) is another recent phenomenon. Most M&A transactions are equity deals and not asset deals given the complexity pertaining to the transfer of assets, especially the transfer of land use rights.

The first stock trading floor in Ho Chi Minh City was inaugurated in 2000 and 22 companies are now listed at this stock exchange. The second stock trading floor in Hanoi is expected to be operational this year. Given the small size of the stock exchange, the number and volume of the M&A transactions involving listed companies can be best described as modest.

GENERAL OVERVIEW

What legislation governs M&A activity in your jurisdiction?

To date, legislation regulating M&A activities has been confined to a handful of separate laws covering M&A principles and procedures; there is no comprehensive and unified M&A law. In the absence of a unified law, M&A rules are found scattered in different legislation, including the provisions on mergers of legal entities and other forms of corporate actions in the 1995 Civil Code. Depending on the legal structure of the target, other corporate and investment laws are relevant, such as, the 2003 Law on State-owned Enterprises, the 1999 Law on Enterprises and the 1994 Law on the Promotion of Domestic Investment (as amended in 1998) with their implementing regulations applicable to SOEs and domestic private companies, and the 1996 Law on Foreign Investment (as amended in 2000) with its implementing regulations applicable to FIEs.

M&A transactions involving listed companies (limited to domestic shareholding companies and equitized SOEs) are subject to securities law, notably Government Decree 144 on Securities and Security Markets issued in 2003 (Decree 144) and the implementing regulations issued by the State Securities Commission (SSC). Lastly, industry specific laws are also relevant, for example, M&A transactions involving banks are governed by regulations issued by the State Bank of Vietnam and are subject to its approval.

The M&A rules are relatively new. Indeed, some basic laws were only issued one or two years ago and, as a result, these rules are in most cases not widely tested.

[1] This Article is also available at http://www.iflr.com

What impact have recent legislative changes had on the nature and amount of M&A activity?

A number of substantial changes in law became effective last year affecting M&A transactions.

Domestic companies

The Law on the Promotion of Domestic Investment, which was first issued in 1994 and then subsequently amended in 1998, provides general principles for preferential treatment for investment in domestic companies and equitized SOEs by overseas Vietnamese and foreign individuals permanently residing in Vietnam or in foreign countries. The legal framework was further enhanced in March last year by the issuance of Decision 36 of the government promulgating the Regulations on Contributing Capital to and Buying Shares from Vietnamese Enterprises by Foreign Investors. Among other things, the Regulations:

- broaden the range of eligible foreign investors to include foreign organizations (whether operating in foreign countries or Vietnam);
- clarify that foreign acquisition of domestic private companies operating in the pre-approved business sectors does not require approval by any competent authority, though post registration with the local registry agencies where such companies were originally registered is needed to record the shareholding change; and
- impose a 30% foreign shareholding ceiling in target companies.

FIEs

In March 2003, Decree 27 amended Decree 24, the main implementing decree for the Law on Foreign Investment, to clarify the mechanism and procedures for M&A transactions involving FIEs. Decree 27 elaborates probably for the first time the documents required to be submitted to the licensing authorities and further clarifies the rights and obligations of surviving entities.

Listed companies

Decree 144 issued by the government in November 2003 to replace Decree 48 (which pre-dated the inception of the first stock markets) is a long and comprehensive document. Because the number of listed companies in Vietnam remains relatively small, the main purpose of Decree 144 and its implementing regulations is to increase the number of listed companies and the trading volume of listed shares. Decree 144 among other things:

- reduces the minimum paid-up chartered capital of companies wishing to conduct an initial public offering (IPO) from D10 billion ($600,000) to D5 billion;
- requires that companies wishing to conduct an IPO be profitable in the last year rather than in the last two consecutive years as previously required; and
- requires a public offering to attract a minimum of 50 investors rather than 100 investors as previously required.

In addition, Decree 144 further elaborates requirements on due diligence and disclosure issues, discussed further below.

What have been the most significant M&A transactions in your jurisdiction over the past year?

There have been no mega-deals in Vietnam over the past year. But recent deals of note include the restructuring of a joint venture between tobacco producer Sampoerna and its Vietnamese partner, Vietnam National Tobacco Corporation, the merger of Elida P/S and Unilever Bestfoods, both owned by Unilever, to form Unilever Bestfoods & Elida P/S VN, the merger of Coca-Cola Ngoc Hoi, Coca-Cola Chuong Duong and Coca-Cola Non Nuoc to form Coca-Cola Beverages Vietnam Ltd and the acquisition by the IFC of 10% of the equity of each of Saigon Commercial Bank (SACOMBANK) and Asia Commercial Bank (ACB).

How, and to what extent, is foreign involvement in M&A transactions in your jurisdiction regulated or restricted?

M&A transactions with foreign involvement can be divided into two types: transactions related to FIEs and transactions related to foreign investors. Generally, either type of transaction must not result in foreign investment in prohibited sectors or in the foreign shareholding exceeding the maximum allowed ownership percentage in the relevant sectors.

The Vietnamese government maintains a policy controlling investment by foreign investors in some sensitive economic sectors. The Law on Foreign Investment provides a list of projects in which foreign ownership and participation is restricted. For example, a foreign investor would not be allowed to establish a 100% foreign-owned enterprise to engage in the exploitation of precious natural resources, maritime or air services business, or consultancy services. Similarly, foreign investment in telecommunications services or public media services must use the form of a business cooperation contract that creates an unincorporated partnership among the investors.

An M&A transaction involving an FIE generally requires approval by the competent licensing authority. Such licensing authority may be the Ministry of Planning and Investment, the local People's Committee or the management board of an industrial zone depending on the size and/or location of the relevant FIE.

Foreign investors are entitled to acquire equity interests in domestic private companies operating in the pre-approved sectors up to a 30% stake limit. As noted above, acquisition of a domestic private company does not require approval by any competent authority, though post-registration with the local registry agency where the domestic company was originally registered is needed to record the shareholding change.

Acquisition of an equitized SOE is subject to a 30% stake limit and approval by the authority approving the acquisition plan.

Foreign investors can acquire up to 30% of the shares of listed companies subject to certain disclosure requirements.

Foreign acquisitions in certain sensitive industries generally require approval by the agencies supervising such industries. For example, acquisitions of banks are subject to State Bank of Vietnam approval and the foreign shareholding limits are 10% and 30% of the equity for a single shareholder and all foreign shareholders respectively.

DUE DILIGENCE

What are the principal disclosure requirements in a typical M&A transaction?

Generally, a seller must disclose all information that may concern a prospective purchaser when making their purchase decision. Such information pertains to, among others, voting rights, rights

to register for purchase of securities and rights to convert securities of the shareholders. A target must also disclose information about share ownership by members of the board of management (or, as the case may be, the board of directors), major shareholders and related persons.

An acquirer who intends to hold 25% or more of the listed shares of a target company must notify the SSC of its intent. If approved by the SSC, the acquirer then must make a public announcement of the proposed acquisition and a general offer to all existing shareholders.

A listed company is requested to publish its annual audited financial statements as well as quarterly or semiannual financial statements. It is also obligated to disclose within 24 hours extraordinary information that may greatly affect the share price. Such extraordinary information includes, among others, the loss of 10% or more of the value of the listed shares, legal actions against members of the management team, change of scope of operations of the listed company and new borrowings of 30% or more of the listed shares.

Decree 144 requires notification to the SSC, the relevant stock exchange and the listed company by a shareholder with respect to any change of holdings at the thresholds of 5%, 10%, 15%, and 20%, by such a shareholder in the listed company.

To what extent do disclosure requirements achieve market transparency?

The recently adopted rules contained in Decree 144 reflect the strong efforts of the Vietnamese government and the SSC to improve market transparency. It is however premature to evaluate the extent to which the disclosure requirements achieve this objective.

How significant an issue is prospectus liability in a typical M&A transaction?

Decree 144 imposes prospectus requirements for companies issuing and listing any types of securities on the stock exchanges. Although Decree 144 requires an acquirer intending to purchase 25% or more of the listed shares of the target to notify the SSC of its intention, it is not mandatory in Vietnam for prospectuses to be issued for M&A transactions involving listed companies. Decree 144 nevertheless prohibits listed companies from releasing false information and changing information already disclosed without an explanation and report to the SSC. The SSC has the authority to monitor or temporarily suspend trading of securities of a listing organization if the listed companies breach the requirements on disclosure of information.

How have recent M&A transactions and/or legislation dealt with the issue of material adverse change clauses?

Vietnamese law is silent on the issue of material adverse change clauses. In practice, it is not uncommon to find these clauses in acquisition agreements that have foreign involvement.

TAKEOVERS

Are there any specific regulations and/or regulatory bodies governing takeovers in your jurisdiction?

No specific law governs takeovers in Vietnam and the general M&A rules as described above apply to takeovers.

The regulatory bodies governing takeovers in Vietnam include the SSC (takeovers of listed companies), the FIE licensing authorities (takeovers of FIEs) and the authorities approving the equitization plans (takeovers of equitized SOEs). No regulatory body governs takeovers of domestic private companies.

What are the various methods by which a takeover can be achieved?

Under Vietnam's legal framework, a takeover of a listed company can be achieved by making a general offer, subject to notification to, and approval by, the SSC, to all of a listed company's shareholders. For FIEs and domestic private companies, a takeover is possible by agreement with all shareholders of the target.

How differently does the legislation treat hostile and voluntary takeover bids?

The takeover procedures do not distinguish between hostile and friendly takeovers. However, hostile takeovers may not be feasible in Vietnam because the costs involved would be too high and the chance for success would be too low.

What penalties are imposed for parties who violate takeover regulations (or equivalent)?

Failure to follow proper procedures can result in the takeover being declared invalid. Violation can also be subject to a maximum monetary fine of D50 million ($3,000). There is no precedent to indicate whether criminal liability may be applicable.

COMPETITION/ANTITRUST

What have been the recent developments in competition policy and legislation as they relate to M&A in your jurisdiction?

To date there is no comprehensive law regulating competition. Vietnamese laws containing provisions that pertain to competition include, among others, the Law on Commerce, the Law on Credit Institutions and the Law on Insurance. These provisions are limited to prohibiting unlawful promotion, publication of misleading information, coercion, and speculation or conspiracy for the purpose of market control. No provisions regulating competition practices directly affect M&A transactions.

Vietnam has taken steps forward in adopting comprehensive competition legislation. The Ministry of Trade prepared a draft Competition Law in 2001. Several versions of the law have since circulated for comments from the domestic and international communities. According to the Vietnam National Assembly's 2004 law-making programme, the draft competition law will be discussed at its May 2004 session and promulgated at its November 2004 session. It is expected that the Competition Law will become effective in May 2005.

The latest draft of the competition law governs restraint of competition as well as other practices, such as those creating unhealthy or unfair competition in Vietnam. A State Administration for Competition under the Ministry of Trade (the Competition Administration) will be established for the purpose of dealing with anti-competitive conducts. In particular, the Competition Administration is authorized to approve M&A transactions based on threshold market share percentages prescribed by law and to mandate reporting requirements.

How are the competition/antitrust regulations enforced in your jurisdiction?

According to the draft Competition Law, the Competition Administration will be responsible for scrutinizing M&A cases that could lead to concentration of economic power. As a key concept of the draft Competition Law, concentration of economic power is defined as: "any action of an enterprise(s), including mergers, consolidations, acquisitions, joint ventures and other forms of conduct, for the purpose of controlling the activities of other enterprises." The Competition Administration is authorized to receive mandatory pre-notification reports of M&A transactions pursuant to which parties could have a combined market share over 30% up to 50%. The draft Competition Law specifically requires that, where participating parties have a combined market

share above 50%, the concentration of economic power will be subject to approval by the Competition Administration. In addition, the Competition Administration is authorized to hold hearings and conduct investigations, if necessary.

How does the legislation/regulation approach the issue of abuse of dominant position?

The Draft Competition Law defines dominant market position as a position in which "any enterprise [is] capable of substantially restraining competition or holding a market share of 30% or more of the relevant market." A group of enterprises is considered as having a dominant market position if such group is capable of substantially restraining competition or is comprised of two or three enterprises that hold a market share of 50% or 75%, respectively, of the relevant market. The draft Competition Law provides a list of types of conduct from which an enterprise or a group of enterprises holding a dominant market position is prohibited from engaging in including, among others, setting prices below production cost to exclude other competitors, limiting production or distribution, restricting the market, or impeding technical development causing loss to customers.

To what extent are parties to an M&A transaction subject to prior notification requirements?

Under the draft Competition Law, where parties to a M&A transaction have a combined market share of over 30% up to 50%, they must notify the Competition Administration of the proposed concentration of economic power 30 days in advance. The Competition Administration must confirm to the parties in writing within 30 days of such notification whether the proposed concentration of economic power is permitted or not. In more complex cases, the 30-day period may be extended up to three times and for no more than 30 days on each occasion. Non-responses from the Competition Administration within that timeframe will automatically be deemed permitted.

Parties having a combined market share of over 50%, however, must automatically apply for approval by the Competition Administration.